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No. 82-50

In the Supreme Court of the United States

October Term, 1982

PAUL R. AHR,
Respondent,
VS.
HELEN AND JAMES R. SMITH,
Petitioners.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the right to appeal is of constitutional dimensions under Fourteenth Amendment concepts of Due Process and Equal Protection of the Laws?

2. If the answer is "yes," does the state supreme court violate constitutional guarantees by accepting a case for hearing and then *sua sponte* sending the case back to the inferior court without granting appellants the opportunity to make oral argument on the merits?

3. If the answer to Question 1 is "yes," have appellants suffered an infringement of constitutional guarantees by the refusal to consider merits of the cause by hypertechnical interpretations of rules of brief writing designed to cause briefs to be *concise* but which in fact demand prolixity?

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No.

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JURISDICTION

The final act of the Missouri supreme court was denial of appellants' further application to transfer April 13, 1982. Jurisdiction is invoked under provisions of 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mo. Const. 1945, Art. 5, Sec. 5.

The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right to trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose.

STATEMENT OF THE CASE

Appellants are co-guardians of the estate of one Fetterolf, an incompetent confined to a state institution operated under supervision of respondent. Respondent filed a claim against the estate for sums allegedly due for treatment and appellants interposed their defense thereto. Respondent was victorious at trial and appellants filed appropriate appellate documents in the Missouri court of appeals. Their successive briefs were met with a challenge that the *Points Relied On* section did not meet requirements of Rule 84.04 (d), Mo. Rules Civ. Proc.—

(d) Points Relied On. The points relied on shall state briefly and concisely what actions or rulings of the court are sought to be reviewed and wherein and

why they are claimed to be erroneous, with citations of authorities thereunder. If more than three authorities are cited in support of a point made, the three authorities principally relied on shall be cited first. All authorities discussed in the argument shall be cited under the "Points Relied On". Long lists of citations should not be included.

Setting out only abstract statements of law without showing how they are related to any action or ruling of the court is not a compliance with this rule.

For example, appellants' Point II—

The court erred in holding that the reasonable value for services rendered Fetterolf had not been paid since there was a complete absence of any competent evidence tending to show that the sums paid were less than reasonable.

was met by argument that "this point fails to specify wherein the testimony or evidence reflects the absence of any evidence tending to show that the sums paid are less than reasonable." Appellants retorted by suggestions opposing a motion to dismiss that respondent "again . . . indulges in a logical absurdity in calling upon (appellants) to 'specify' what evidence or testimony 'reflects the absence of any evidence.' This is a case where there is *no* evidence on the point."

The Missouri supreme court did grant appellants' original motion to transfer in part, the motion being sustained "for consideration of the limited issue of whether appellants' points comply by Rule 84.04." A full and complete transcript of the record and proceedings in the court of appeals, together with copies of all records and briefs filed, were summoned from the inferior court. (Appendix C)

Thereupon, however, the supreme court proceeded to enter an order retransferring the case to the court of appeals, there being no oral argument afforded. (Appendix B)

The order is silent as to the merits. Once back to the court of appeals, that court proceeded to summarily reinstate its original ruling of dismissal. Subsequently, appellants filed their further motion to transfer back to the supreme court for determination of the merits, but that motion was denied. (Appendix A)

The federal constitutional questions were raised throughout this "ping pong" handling of the case between the court of appeals and the supreme court:

> *Motion for Rehearing, or, in the Alternative, to Transfer Cause to the Supreme Court of Missouri, En Banc* (July, 1981, in the Missouri Court of Appeals, Western District). * * * By its order of dismissal, a functional and legal equivalent to a final adverse decision, the Court has violated Constitutional provisions of due process * * * and of equal protection of the laws (U. S. Const., Amend. 14 * * *), in not providing a decision on the merits of the controversy and precluding appellants from presenting full argument on the merits.
>
> *Application for Further Transfer to the Supreme Court* (March, 1982, in the Supreme Court of Missouri). * * * This Court had, by order of December 14, 1981, transferred this cause back to the Missouri Court of Appeals for plenary consideration of all the substantive issues raised by the appeal, yet that court did not set the case down for argument of counsel nor grant counsel further opportunity for written argument—rather, the Court, on January 5, 1982, by

its recital "after being fully advised in the premises" —reinstated an order of July 10, 1981 dismissing the cause.

Such proceeding violates constitutional guarantees of due process and equal protection.

By its refusal to take back the case on retransfer the supreme court adopted an unconstitutional sequence of events which found no hearing afforded on the merits either at the court of appeals or supreme court level, it is submitted. Inasmuch as there is no provision for further relief at the state level once the state supreme court has denied transfer, the instant petition is appropriate.

ARGUMENT

Traditional thought was that there was no constitutional right of appeal. Then came the view that once a state constitution provided for appeals (as is implied by the reference in the Missouri Constitution of 1945 that rules of court should not change the "right of appeal"), there was such a fundamental right of appeal. Appellants submit that the Fourteenth Amendment due process and equal protection clauses command a meaningful right of appeal by affording a hearing on merits of cases in the state appellate courts.

Arbitrary rulings on such things as the wording of "Points Relied On" make for prolixity in briefs rather than the desideratum of conciseness. And when a state supreme court takes a case from an inferior court and then does not even permit a hearing on the merits of even the brief-style points, fundamental justice of constitutional protection for litigants is obliterated.

A right of appeal is meaningless unless the litigants are permitted to explore the merits of controversy through oral argument before the tribunal. By arbitrary determination that wording of "Points Relied On" is not extensive enough, indeed the very basic directive of the supreme court rule—"the points • • • shall state briefly and concisely • • •" is violated by judicial dismissal.

Since the professional literature notes that such action is rather frequent in Missouri, the matter is of general importance and the statistics tend to support an equal protection infirmity of the courts' dismissal actions. *Lindsey v. Normet*, 405 U.S. 56, 77 ("When an appeal is afforded • • • it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause").

Respectfully submitted,

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APPENDIX

APPENDIX A

No. 63337

IN THE SUPREME COURT OF MISSOURI
WD No. 32146

January Session 1982

Paul R. Ahr,
Respondent,

vs.

TRANSFER

Helen and James R. Smith, et al.,
Appellants.

Now at this day, on consideration of Appellants' Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI—SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session thereof, 1982, and on the 13th day of April, 1982, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 13th day of April, 1982.

/s/ Thomas F. Simon Clerk.
/s/ Norma Jean Creach D.C.

APPENDIX B

SUPREME COURT OF MISSOURI
EN BANC

December 14, 1981

No. 63337

PAUL R. AHR,
Respondent,

vs.

HELEN and JAMES R. SMITH, et al.,
Appellants.

ORDER

On July 10, 1981, the Missouri Court of Appeals, Western District, upon motion of respondent, dismissed this cause for failure of appellants to comply with the briefing requirements of Rule 84.04.

On October 13, 1981, this Court upon appellants' application, transferred the cause "for consideration of the limited issue of whether appellants' points comply with Rule 84.04."

This Court, upon such limited consideration, now determines that the cause should be retransferred to the Court of Appeals.

So ordered.

Day - to - Day

/s/ Robert T. Donnelly
Robert T. Donnelly, Chief Justice

APPENDIX C

IN THE SUPREME COURT OF MISSOURI
EN BANC

NO. 63337

WD #32146

Paul R. Ahr,
Respondent,

vs. TRANSFER

Helen and James R. Smith, et al.,
Appellants.

THE STATE OF MISSOURI to the Judges of the Missouri Court of Appeals, WESTERN District, GREETINGS:

Now at this day, on consideration of the application of appellants Helen and James R. Smith, et al. to transfer the above-entitled cause, No. 32146, from the WESTERN DISTRICT, Missouri Court of Appeals, it is ordered that said application be, and the same is hereby sustained for consideration of the limited issue of whether appellants' points comply by Rule 84.04.

Therefore, you, as Judges of the Missouri Court of Appeals, WESTERN DISTRICT, are ordered to send to this Court on or before the 12th day of November, 19 ....., a full and complete transcript of the record and proceedings in your court, together with copies of all records and briefs filed in your court in the said cause.

It is further ordered that you recall your mandate, if the same has issued, and that you take no further action in this case.

IN TESTIMONY WHEREOF, I have hereunto set my hand and the Seal of said Court, at my office in the City of Jefferson, this 13th day of October, 1981.

/s/ Thomas F. Simon
Clerk, Supreme Court of Missouri

By: /s/ Norma Jean Creach, D.C.

APPENDIX D

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD 32146

Cir. Ct. # 7911249201

PAUL R. AHR,
Respondent,
v. (Jackson)
HELEN & JAMES R. SMITH,
Appellant.

ORDER

NOW ON THIS DAY the Court considers Respondent's Motion to Dismiss the appeal in the above-styled cause and being advised that:

(1) On April 27, 1981, Respondent filed a motion to dismiss or in the alternative to strike the brief filed by appellants on March 26, 1981;

(2) On May 11, 1981, the Court denied Respondent's motion to dismiss but instead sustained the motion to strike appellants' brief and gave appellants leave to file an amended brief on or before May 26, 1981;

(3) On May 27, 1981 appellants filed their amended brief;

(4) On June 29, 1981, after giving proper notice in accordance with Supreme Court Rule 84.10 Respondent filed his motion to dismiss based on appellants'

failure to comply with Supreme Court Rule 84.04 and appellants responded to the motion to dismiss;

Now therefore the Court having considered all of the foregoing

IT IS ORDERED that Respondent's motion to dismiss be and is hereby sustained and the above-styled cause is dismissed for the reason that appellants have failed to comply with Supreme Court Rule 84.04.

Dated this 10 day of July, 1981.

/s/ William E. Turnage
William E. Turnage, Acting
Chief Judge

cc: Maria Angela Kendro
Elwyn L. Cady